

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

RUSSELL BORTHWICK,

Petitioner,

v.

9:10-CV-556 (NAM/RFT)

**THOMAS LAVALLEY, Superintendent of
Clinton Correctional Facility,**

Respondent.

APPEARANCES:

Russell Borthwick
Petitioner, Pro se
05-B-3082
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929

Hon. Eric T. Schniederman
Attorney General of the State of New York
Thomas B. Litsky, Esq.,
Assistant Attorney General
120 Broadway
New York, NY 10271

Hon. Norman A. Mordue, Senior United States District Judge:

MEMORANDUM-DECISION AND ORDER

INTRODUCTION

Petitioner Russell Borthwick filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on May 13, 2010. Dkt. No. 1. In a Report-Recommendation and Order dated May 1, 2014, United States Magistrate Judge Randolph F. Treece recommended that the Court deny and dismiss the petition and decline to issue a certificate of appealability. Magistrate Judge

Treece's recommendation is based on his conclusion that: (1) petitioner failed to exhaust, and is procedurally barred from raising, his claims that the sentencing judge (a) coerced the verdict and (b) imposed an excessive sentence because he proceeded to trial instead of accepting a plea agreement; (2) petitioner's claim that trial counsel was ineffective because he did not call an expert medical witness, or any other witness, to testify is barred from federal habeas review because it was decided in state court on an independent and adequate state ground and he could not, in any event, shoulder his burden of showing that the results of the trial would have been different; and (3) the Appellate Division properly applied the correct legal standard to petitioner's ineffective assistance of counsel claims, including his claim that his attorney failed to "have defendant testify at trial." Dkt. No. 17, p.18.

DISCUSSION

Petitioner objects to Magistrate Judge Treece's conclusions regarding trial counsel's alleged ineffectiveness based on his failure to call any witnesses and failure to give the jury the "opportunity to hear from the defendant". Dkt. No. 18. Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court reviews de novo those parts of a report and recommendation to which a party specifically objects.

Upon de novo review, the Court accepts and adopts the Report-Recommendation and Order in its entirety. Magistrate Judge Treece accurately recounted the facts and procedural history of this case and employed the proper legal standards when analyzing petitioner's claims. Petitioner failed to show that the results of the trial would have been different if trial counsel had called a medical expert, or other witnesses, to testify. Further, as Magistrate Judge Treece noted, petitioner does not allege that trial counsel prohibited him from testifying or failed to inform him

of his right to testify.

It is therefore

ORDERED that the Report-Recommendation and Order (Dkt. No. 17) is **accepted and adopted in its entirety**; and it is further

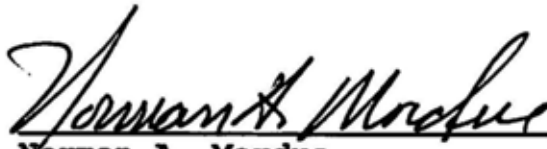
ORDERED that the Petition (Dkt. No. 1) is **DENIED in its entirety** and **DISMISSED**; and it is further

ORDERED that no certificate of appealability shall be issued; and it is further

ORDERED that the Clerk of the Court is directed to serve copies of this Memorandum-Decision and Order in accordance with the Local Rules of the Northern District of New York.

IT IS SO ORDERED.

Date: September 25, 2014


Norman A. Mordue
Senior U.S. District Judge